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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. [redacted] 2

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; JAY OLINGER, as Supervisor of the Safety Division of Said Department, and HOWELL PARKER, as Deputy of Said Department under the Title, Marine Inspector,

Petitioners,

VS.

STATE OF WASHINGTON on the Relation of FOSS COMPANY, INC., a corporation; ALLMAN-HUBBLE TUGBOAT COMPANY, INC., a corporation, *et al.*,

Respondents,

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENTS' BRIEF

GLENN J. FAIRBROOK,
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660 Central Building,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

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RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Petitioners' "Statement of the Case," while not as comprehensive as might be desirable, is accepted as a statement of most of the essential facts. Such other facts as we feel should be called to the particular attention of the court, we refer to in the argument.

We do not, however, accept in entirety, petitioners' analysis of the questions involved.

We do not unqualifiedly accept petitioners' statement that the state legislature intended chapter 200 Laws of Washington 1907 to apply to federal waters. We believe there is grave doubt whether it so intended. Nor do we agree entirely with all the implications possibly arising from petitioners' statements that the act does not attempt to regulate respondents' vessels as such but that it regulates them only as they are engaged in the business of towing for hire. A distinction should be noted also in petitioners' use of the term "inland waters" of the state. The waters to which petitioners apply that term are not the land locked waters of the state over which we concede that the state has complete control, but the sounds, bays, inlets and rivers of the state which are open to the sea and which are within federal jurisdiction.

Petitioners' attempted enforcement of chapter 200 Laws of Washington 1907 as to respondents' vessels was an attempt to enforce on all waters within the territorial boundaries of the state all the provisions of the act, including such provisions as the act made for lights and pilot rules.

Petitioners now concede that they have no such authority, but do claim the right to inspect the hulls and machinery of motor tugs and require changes therein, license officers, fix the number of the operating personnel, prescribe safety equipment, in fact, enforce the act in any particular and as to any vessel where there is not an act of Congress which specifically cov-

ers every requirement of the act of the state as to every class, type, length or tonnage of a vessel.

(Chapter 200 of the Laws of Washington for 1907, the act which is involved here, is hereinafter referred to as "the act" or "the law").

Petitioners' argument, although not presented in in the same relationship, proceeds upon the following theory:

1. That there is a field of local matters incidentally affecting vessels navigating federal waters on which the state may legislate until Congress occupies the field;

2. That (a) inspection to determine seaworthiness, fitness of physical structure, condition of machinery, and related subjects, (b) licensing of the operating personnel, (c) control over the number of the crew and passengers to be carried, and (d) regulation of safety equipment are matters of local concern;

3. That as Congress has not made any specific regulations on these matters for all types and sizes of vessels, the state may make regulations therefor applicable to vessels of all types and sizes for which Congress has not made specific provision.

The correctness of the first premise does not seem to be arguable. The second and third premises are fundamentally unsound. It was so determined by the state court. Petitioners' argument on the false contentions is, however, so interwoven with an erroneous application of the true premise that the state may legislate on purely local matters that we feel we can best aid the court by approaching the questions in our own way rather than by following the argument of

petitioners in the order in which it is set forth in their brief and their specification of errors.

Our position is, therefore:

SUMMARY OF RESPONDENTS' ARGUMENT

I. The federal government has the exclusive right to regulate vessels navigating waters over which the United States has jurisdiction except as to matters purely local.

II. The regulations sought to be imposed by petitioners are not within the class of local regulations on which the state may legislate until Congress acts.

III. Even were it permissible for the state, in the absence of congressional action, to impose the regulations sought to be imposed, Congress has occupied the field to the exclusion of state regulation.

IV. Regardless of this court's conclusion on the federal question, the judgment of the state court is right and should be affirmed.

A. Executive construction that the act applies only to waters having no navigable outlet to the sea should be followed.

B. The act was adopted from the New York Navigation Law, which applies only to such waters.

C. The provisions for examination and licensing of officers constitute an unconstitutional delegation of legislative power.

D. Unless the act be construed to apply only to waters having no navigable outlet to the sea, it contains so much that is unconstitutional that the entire act must fail.

ARGUMENT

I.

The Federal Government Has the Exclusive Right to Regulate Vessels Navigating Waters Over Which the United States Has Jurisdiction, Except As to Matters Purely Local.

The power to regulate interstate and foreign commerce includes the regulation of navigation and was one of the primary objects which led to the adoption of the Constitution. The starting point of any inquiry as to the powers of Congress or the states in the matter of regulation of navigation is, of course, the case of *Gibbons v. Ogden*, 9 Wheat. 1, in which this court made that pronouncement.

When the subjects

> "are national in their character and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise there would be no protection against conflicting regulations of different states, each legislating in

favor of its own citizens and products and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in Congress."

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

"Waters navigable in themselves in a state and connecting with other navigable waters so as to form a waterway to other states or foreign nations cannot be obstructed or impeded so as to impair, defeat or place any burden upon a right to their navigation granted by Congress."

Harman v. Chicago, 147 U. S. 396.

There is, however, a field of matters which affect vessels, and which incidentally affect commerce, in which the states have power to legislate until Congress has acted on the subject.

"The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the states.

"Whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated."

* * * * * * *

"The states may exercise concurrent or independent power in all cases but three:

"1. Where the power is lodged exclusively in the Federal Constitution.

"2. Where it is given to the United States and prohibited to the states.

"3. Where, from the nature and subjects of the power, it must necessarily be exercised by the National Government exclusively."

Gilman v. Philadelphia, 3 Wall. 713.

The commerce clause of the Constitution as repeatedly stated,

"denies authority to the state in all cases where the subject is of such a nature as to demand that, if regulated all, its regulations should be through a general or national system, and that it should be free from restraint or direct burdens save as it is constitutionally governed by Congress; and on the other hand, as to those matters which are distinctive local in character, although embraced within the federal authority, the rule recognizes the propriety of the reasonable exercise of the power of the states, in order to meet the needs of suitable local protection, until Congress intervenes."

Wilmington Transportation Co. v. R. R. Comm. of Cal., 236 U. S. 151.

The subjects on which the state may so legislate are those matters which are of purely local concern.

"Regulations of this kind are necessary and indispensable in every commercial port, for the convenience and safety of commerce, and the

local authorities have a right to prescribe at what wharf a vessel may lie and how long she may remain there, where she may unload or take on board particular cargoes, where she may anchor in the harbor, and for what time, and what description of light she shall display at night to warn the passing vessels that she is at anchor and not under sail. They are like to the local usages of navigation in different port, and every vessel, from whatever port of the world she may come, is bound to take notice of them and conform to them."

Wm. Cushing v. Owners of Ship "John Frazier", 21 How. 184.

An exception to the general principle that the federal government has the exclusive power to regulate transportation,

"is the regulation of steamboats and other water craft in the ports and harbors of the states, which is required for the accommodation and safety of vessels resorting thither in the pursuits of business and commerce. These are police regulations in aid and furtherance of commerce, enacted by local authorities, who have a knowledge of the wants of the locality, and a deep interest in properly providing for them."

Steamboat "New York" v. Rae, 18 How. 223.

The states may also levy fees to defray the costs of a purely local regulation of harbor traffic. Those fees are not an objectionable burden on commerce.

"State regulations of harbor traffic, although

they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not the subject of regulation by Congress, they are not forbidden."

Clyde Mallory Lines v. Alabama, 296 U. S. 261.

It has long been settled that the states may regulate pilotage as this "does not interfere with any system which Congress has established by making regulations, or intentionally leaving individuals to their own unrestricted action."

Cooley v. Board of Port Wardens of Philadelphia, 12 How. 299.

All such laws

"form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike—roads, ferries, etc., are component parts of this mass."

Gibbons v. Ogden, 9 Wheat. 1.

Quarantine laws are of this class.

"Quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until dis-

placed or contravened by some legislation by Congress.

"The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities."

* * * * * * *

"Quarantine laws are so analogous in most of their features to pilotage laws, in their relation to commerce, that no reason can be seen why the same principle should not apply."

Morgan v. Louisiana, 118 U. S. 455.

The state may also make laws and enforce liens concerning contracts not maritime in their nature "and it is no valid objection that the enforcement of such laws may prevent or obstruct the prosecution of a voyage of an interstate character."

The *Winnebago*,, 205 U. S. 354.

These laws, as this court said in *Cincinnati etc. Packet Co. v. Board of Trustees of Catlettsburg*, 105 U. S. 559, fall within that class of rules

"which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing places can be properly made. If a regulation of commerce at all, it comes within that class in which the states may prescribe rules until Congress assumes to do so."

II.

The Regulations Sought to Be Imposed by Petitioners Are Not Within the Class of Local Regulations on Which the State May Legislate Until Congress Acts.

From the foregoing decisions of this court, the following seem to be the deductible rules for determining whether state laws affecting vessels and navigation are within the power of the state and not an infringement on the power of the National Government:

Are the laws distinctively local in their operation?

Gilman v. Philadelphia;

Wilmington Transp. Co. v. Cal. R. R. Com.

Do they affect only local usages of navigation?

Wm. Cushing v. Owners of Ship John Frasier.

Are they regulations of solely the ports of the state?

Steamboat New York v. Rea;

Clyde Mallory Lines v. State.

Can the regulations be most wisely exercised by the local authorities?

Cincinnati, Etc., Co. v. Board.

Are they best suggested by varying circumstances of different localities?

Gilman v. Philadelphia.

If the state law can meet all these tests then it may stand, but if, on the contrary, the subjects and the nature of the regulations which the state seeks to impose, are national in their character and require uniformity of regulation affecting alike all the states so that they must necessarily be exercised only by the National Government, then the state law must fail.

The regulations which petitioners claim the right to enforce under the authority of chapter 200 of the Laws of Washington for 1907 do not meet these tests. They are not purely local in their character. They are not regulations of local harbor traffic. They are not regulations of matters necessary because of any circumstances peculiar to the harbors or waters within the territorial limits of the state. They are not such that they are most capable of exercise by local authorities. They affect the very existence of the vessel herself and her right to navigate at all. If Washington may require changes in the hull and machinery of a motor tug so may Oregon. The changes ordered by Washington may differ from those required by Oregon to the extent that the owners of the vessel could not possibly comply with the orders of both states. If Delaware may regulate the machinery and hulls of vessels on the Delaware River and the Bay, so may Pennsylvania and New Jersey; if New York may do so on the Hudson and Long Island Sound, Connecticut, Rhode Island, and Massachusetts may prescribe what is necessary to be changed on the hull of a New York motor tug plying between the Hudson and the ports of those states. Each state may make its own regulations, the regulations may all conflict and compliance be impossible. The situation extends likewise to the Great Lakes. It is vital in this case.

One of the respondents in this case, Shaver Transport Co., is an Oregon corporation whose vessels are largely used in towing across the Columbia between Oregon and Washington. One is a Washington com-

pany, Knappton Towboat Co. (R. 14), whose vessels are largely used in towing on that river between Washington and Oregon. The record does not disclose—as indeed it could not—that a vessel whose hull and machinery are safe for operation and whose crew is ample and capable for navigation on the Oregon side of the river can not as safely ply the waters on the Washington side of the river. Vancouver authorities, under appropriate law for that purpose, may prescribe where the boats of the Shaver Transport Company may lie at anchor in that port, but to permit the state of Washington to say that a hull deemed sufficient in Oregon may not put in at Vancouver because Washington deems changes in the hull necessary, is to deny that vessel the right to engage in commerce between the two states.

The situation here is the same as was before this court in *Hall v. DeCuir*, 95 U. S. 485, in which this court held in violation of the Commerce clause a Louisiana law which provided that carriers should not discriminate in accommodations between persons on account of race or color. The reasoning of the court in that case so clearly fits the case here that we quote from the opinion:

> "It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each was at liberty to regulate the conduct of carriers while

within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabins during his passage down the river, or be subject to any ac-

tion for damages, 'exemplary as well as actual' by any one who felt hisself aggrieved because he had been excluded on account of his color.

"This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress in effect adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the states, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade."

In this case the regulations sought to be imposed by the state would not destroy uniformity on the Columbia River alone. Many vessels of respondents ply between ports on Puget Sound and British Columbia, occasionally some put in at California ports. A large portion of their navigation is in interstate and foreign commerce. They are engaging in interstate commerce when towing an intercoastal vessel or shifting her from pier to pier in the harbors of Puget Sound. Petitioners attempt to draw a distinction between the regulation of respondents' boats as such and what they contend the act does, *i. e.*, regulate them as engaging in the business of towing for hire. There can be no such distinction drawn. Manifestly the only business in which a tug engages is towing for hire. If a tug is inspected as to her hull and machinery,

her personnel licensed, her equipment regulated, and changes ordered in her hull and machinery, her freedom to navigate is regulated and burdened. When that navigation is on federal waters and in interstate commerce, the power to make such regulations rests exclusively in Congress.

The regulations which petitioners here sought to impose on respondents affect the very right of vessels to navigate the federal waters of Puget Sound, Willapa Harbor, Grays Harbor, the Columbia River, and other waters of the state of Washington which are under federal jurisdiction.

Petitioners claim authority under the act to compel respondents to

(a) Submit their vessels to inspection annually or oftener at his discretion at a cost to said owners of not less than five nor more than twenty dollars for each inspection.

(b) Make such changes, repairs and improvements as said Director may require.

(c) Carry such officers as he shall license as masters, pilots and engineers.

(d) Carry such crews as he shall deem necessary to manage such vessels with safety.

(e) Carry such life saving equipment as he shall require and approve.

(f) Carry such fire prevention apparatus as he shall require and approve.

(g) Keep on board at all times a copy of a license authorizing the vessel to navigate in and upon the waters of the state.

(h) Keep a copy of the first twenty-two sections of

the act (twelve pages) posted in a conspicuous place.

(i) Keep the vessel's name painted on her stern in the character and colors prescribed by section 16 of the act.

(j) Comply with all orders, regulations and requirements of the Commissioner.

Do petitioners seriously contend that they can lawfully make those requirements of a Canadian tug which tows a raft of logs from Vancouver, B. C., to Seattle, or a barge from Seattle to Vancouver, B. C.? Do they seriously contend that the respondents, Shaver Transport Co. and Knappton Towboat Co., over fifty per cent of whose business is towing across the Columbia River between points in Oregon and points in Washington (R. 57, 60) must stop that operation unless they submit to these requirements, or do they admit that these foreign tugs have the right to use the navigable waters of the United States without state interference, and seek only to make it impossible for our own tugs to compete with them in our own waters by loading upon them this mass of onerous requirements and regulations? Respondents claim the right to navigate the public waters of the United States lying within the territorial limits of the state on equal terms with the tug boat operators of British Columbia and Oregon. This is a right guaranteed by the Constitution because every citizen of the United States has the right to navigate its public waters on equal terms. To secure such equal terms to all was the purpose of conferring the exclusive power of regulation upon the federal government.

It is the same right to navigate federal waters

which this court recognized in *Harman v. Chicago*, 147 U. S. 396, where this court said:

> "The requirement that every steam tug, barge or towboat towing vessels for hire on the Chicago River or its branches shall have a license from the city of Chicago is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States except upon conditions imposed by the city. This ordinance is therefore plainly and palpably in conflict with the power of Congress to regulate commerce interstate and foreign. The steam tugs are not confined to any one particular locality but may carry on the trade for which they are licensed in any of the ports and navigable rivers of the United States. They may pass from the river and harbor of Chicago to any point on Lake Michigan or other lakes and rivers connected therewith. As justly observed by counsel: The citizen of any of the states bordering on the lakes who with his tug boat also enrolled and licensed for the coasting trade may wish to tow his or his neighbor's vessel must, according to the ordinance, before he can tow it into the Chicago River or any of its branches, obtain a license from the city of Chicago to do so. The license of the United States would be insufficient to give him access to these waters * * *."

The state court therefore correctly decided that the regulations which petitioners sought to impose encumbered the right of vessels to navigate freely on

Federal waters and therefore burdened interstate commerce.

III.

Even Were It Permissible for the State, in the Absence of Congressional Action, to Impose the Regulations Sought to Be Imposed, Congress Has Occupied the Field to the Exclusion of State Regulation.

But even should it be conceded that the inspection of hulls, the licensing of operating personnel, and other regulations which petitioners seek to impose upon respondents' vessels, were matters of purely local concern upon which the state might legislate until Congress had occupied the field, that field has been so occupied by Congress as to exclude any state regulation. Apparently petitioners' only contention at the present time is that chapter 200 of the Laws of 1907 may be enforced against such of respondents' vessels in such particulars as are not specifically provided for by federal legislation. Congress has, however, completely occupied the field in such a manner as to indicate that the laws which it has passed and the regulations made thereunder are sufficient regulations, and all the regulations, which it deems necessary.

The volume of legislation concerning vessels and navigation is literally tremendous. Title 46, Shipping, U. S. C., has 1315 sections. Title 33, Navigation and Navigable Waters, now has 950 sections. A great part of the Internal Revenue Laws consists of measures affecting navigation and shipping. Then there are volumes of regulations having the force of

law; as for example, respondents' exhibit 4. These laws and regulations are indeed comprehensive, covering the building, ownership, manning and operation of vessels in the most minute manner. All vessels are required to be registered or enrolled or, if very small, numbered. Even row boats are regulated.

> "Rowing boats, whether under oars or sail, shall have ready a lantern showing a white light which shall be temporarily exhibited in sufficient time to prevent collision."
>
> U. S. C., Title 33, sec. 76, Act of Cong. Aug. 19, 1890 c. 802 §1, 26 Stat. 322.

The federal laws are not restricted to the mere construction, operation and maintenance of the vessels. Congress has jurisdiction to regulate the rights of seamen. The word "vessel" includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water (U. S. C., Title 1, sec. 3, R. S. sec. 3) and every person who serves in any capacity on board a vessel is a seaman (U. S. C., Title 46, sec. 713, Act of Cong. Mar. 4, 1915, c. 153 §10; 38 Stat. 1168). There is an enormous body of legislation designed to provide for their protection, their safety and their comfort. The word "seamen" consumes five pages of the U. S. C. A. index.

All of the vessels involved in this case and the men who work upon them are subject to these laws. All are registered or enrolled and licensed to engage in the coasting trade under these laws. Some of them are engaged in interstate commerce and some of them in foreign; all are afloat on an international natural

highway which leads to and from every seaport in the world.

Petitioners say that there is no federal enactment providing for the inspection of the hulls of motor boats or their machinery, the licensing of their officers, the number of the crew or passengers. That is true, but the inference is that Congress has not thought such laws necessary. A bill for that purpose has been before Congress. A copy was read into the record (R. 53). There is nothing to indicate, that we know of, that in failing to pass it Congress desired to leave the subject to the individual states. There is much to indicate that it probably did not regard such legislation as necessary.

It is the statutory duty of the Commissioner of Navigation to recommend changes in the navigation law, U. S. C. Title 46, section 4, Act of Cong. Mar. 4, 1913, c. 141, sec. 1; 37 Stat. 736. In 1932 he did suggest that the larger class of motor driven vessels should be made subject to the same inspection laws as steamboats, but speaking of the smaller vessels he said:

> "Congress has paid special attention to their life saving equipment, navigation and supervision under existing laws, however, every provision seems to have been made which is reasonably necessary to the protection of those on board and if these small motor boats are operated in compliance with the laws now in force a reasonable degree of safety will be attained." (St. 139)

Such a law was subsequently enacted, Act. of Cong. June 20, 1936, 49 Stat. 1544.

Similar passages will be found in respondents' exhibits 6 to 11, inclusive.

The regulation and inspection of vessels by the Federal government extends in some particular to every type of vessel, and, as to some vessels, to every type of regulation.

The matter of lights is governed by Federal law as to all vessels—even row boats. The Coast Guard inspects all vessels as to life preservers, fog horns, and fire prevention equipment, whether the rules of the road are posted, whether numbers are properly cut on the main beam (R. 43, 55, 61).

The customs service of the Treasury Department measures all hulls (R. 43) and inspects hulls when the names of vessels are changed.

The Bureau of Marine Inspection and Navigation of the Department of Commerce inspects the hulls and boilers of all steam vessels.

By the Act of Congress, June 20, 1936, 49 Stat. 1544 all existing laws covering the inspections of steam vessels were made applicable to seagoing vessels of three hundred gross tons and over propelled in whole or in part by internal combustion engines.

In 1907, when the law here in question was enacted, Congress had not as yet legislated extensively with respect to motor boats, thus indicating that it felt that no regulation of motor boats was necessary, but in 1910 Congress passed chapter 16 of Title 46 U. S. C., known as the Motor Boat Code (Act of Cong. June 9, 1910 C. 268; 36 Stat. 462). That act governs all motor propelled vessels under 65 feet in length and therefore 111 of the 139 involved in this suit. Sec-

Insert as page 22½ of respondents' brief—to be read following paragraph six on page 22

When the act of June 20, 1936 (49 Stat. 1544; Public No. 722; H. R. 12419, 74th Cong. 2d Sess.) was under consideration by Congress, both the House and the Senate in reporting the bill favorably called attention to the fact that the Bureau of Navigation and Steamboat Inspection (now Bureau of Marine Inspection and Navigation) was working on plans for conferences at which would be considered a thorough revision of all laws pertaining to motor boats, vessels under three hundred tons propelled by internal combustion engines, and the smaller steam vessels. 74th Cong. 2d Sess. House Report No. 2505, Senate Report No. 2212.

On June 22, 1936, the Bureau sent to the motorboating industry, yacht clubs and others concerned, its Circular Letter No. 11 giving the Bureau's suggestions for revision of the laws pertaining to such vessels. The Bureau advises that a series of conferences were held with those interested and that as a result a proposed bill is being drafted. Circular Letter No. 11 is a printed document. Neither the proceedings of the conferences nor the draft of the proposed bill are available.

tion 511, Title 46 U. S. C. (Section 1) defines motor boats. Section 512 (2), divides them into classes. Section 513 (3), describes minutely the lights each class shall carry. Section 514 (4), prescribes minutely their signaling equipment and how it shall be used. Section 515 (5), provides the number and kind of life preservers they shall carry. Section 515 (5), further provides that motor boats carrying passengers shall be navigated in charge of a man licensed by the local board of steamboat inspectors and then closes with this proviso:

> "*Provided*, That motor boats shall not be required to carry licensed officers except as requir- by this chapter."

Section 516 (6), provides for fire fighting apparatus. Section 517 (7), provides penalties, and section 518 (8), provides:

> "The Secretary of Commerce shall make such regulations as may be necessary to secure the proper execution of this chapter by collectors of customs and other officers of the government."

If petitioners ever had any rightful power by virtue of chapter 200 to regulate any vessel navigating the public navigable waters of the United States by way of prescribing life saving equipment, fire equipment, lights, licensed officers, and all the other things which they claim the right to do, it is certain that as to 111 of the vessels involved in this suit such powers were abrogated by the Federal Motor Boat Law of 1910. But petitioners never had any such powers. There is not a single subject dealt with in chapter

200, not a field entered, that was not already occupied by congressional enactments.

Since this case was tried in the state court, Congress has further extended regulation of vessels by the federal government. By the Act of Congress of August 26, 1935, 49 Stat. 868, no vessel regardless of size or rig, except certain government vessels, is permitted to transport any inflammable explosive or like dangerous cargo until inspected by Federal inspectors.

By the Act of June 23, 1936, 49 Stat. 1889, all vessels, regardless of tonnage, size, or manner of propulsion having on board inflammable or combustible liquid cargo in bulk, except certain government vessels, are to be considered as steam vessels subject to inspection under those laws.

By the Act of May 20, 1936, 49 Stat. 1542, provision is made for the licensing of coasting and fishing vessels.

By the Act of June 20, 1936, 49 Stat. 1593, the provisions of the Coastwise Load Line Act of August 27, 1935, are extended.

Congress has constitutional power to regulate navigation. It has regulated it. It can not be, therefore, as this court said in *Prigg v. Pennsylvania*, 16 Pet. 539:

> "* * * that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of congress, in what it does prescribe, manifestly indicates that it does

not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognized by this court, in the case of *Houston v. Moore*, 5 Wheat. Rep. 1, 21, 22; where it was expressly held, that where congress have exercised a power over a particular subject given them by the constitution, it is not competent for state legislation to add to the provisions of congress upon that subject; for the will on congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed."

The power of Congress has been exercised and the regulations which Congress deemed it proper to make are now in full operation.

The principle enunciated in *Prigg v. Pennsylvania* has been time and time again adhered to by this court.

In *Missouri Pac. Ry. Co. v. Porter*, 273 U. S. 341, decided in 1927, this court said:

"Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its powers to regulate such commerce and all its instrumentalities are supreme and as that power has been exerted state laws have no application. They cannot be applied in coincidence with, as complementary to, or in opposition to Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

In upholding the exclusive operation of the Federal Employers Liability Act in an opinion rendered in 1929 in *Chesapeake & Ohio R. R. Co. v. Stapleton*, 279 U. S. 587, this court quoted from *Prigg v. Penn.* the same passage quoted in the opinion in *Southern R. Co. v. Railroad Commission*, 236 U. S. 439. In the same year *Prigg v. Penn.* was cited in the opinion in *International Shoe Co. v. Pinkus*, 278 U. S. 261, and in an opinion handed down April 2, 1934, in *Gilvary v. Cuyhoga Valley R. Co.*, 292 U. S. 57, this court cited *Prigg v. Penn*, as its first case in support of the following pronouncement concerning the act governing railroad equipment:

> "So far as the safety of such vehicles is concerned these acts operate to exclude state regulation whether consistent, complementary, additional or otherwise."

The fact that the state law is passed in exercise of the police power in no manner affects the rule we are discussing. See the opinion in *Napier v. Atlantic Coast Line*, 272 U. S. 605, and that portion of the opinion in *Kansas City S. R. Co. v. Kan. Valley Drainage District*, 223 U. S. 573, where this court says that the operation of the rule cannot be avoided "by simply invoking the convenient apologetics of the police power."

Petitioners' argument that the regulations they seek to impose are regulations of local matters which are valid because Congress has not acted with respect to certain specific vessels in certain particulars, is based largely upon the railroad cases. The argument is largely disposed of by the distinction noted by this

court in one of the cases relied upon by petitioners, *Smith v. Alabama*, 124 U. S. 465, in which this court said:

> "It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a state and by the authority of its laws * * *. The places where they may be located, and the plans according to which they may be constructed are prescribed by the legislature of a state * * *. The safety of the public in person and property demands the use of specific precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and hedges, the kinds of cuts and tunnels, the mode of crossing highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation designed to protect persons and property otherwise endangered by their use are strictly within the limits of the local law."

But even in the case of railroads, which are not natural highways of commerce, the state may not enact even supplemental legislation where Congress has occupied the field.

This principle is well illustrated by the opinion in

Southern R. Co. v. Railroad Commission, 236 U. S. 439, where this court said:

> "In *Erie R. Co. v. New York*, 233 U. S. 671, a like ruling was made in a case where the New York law punished a railroad company for allowing an employee to work more than eight hours when the Federal statute punished the company for employing him for more than nine hours—even though it was argued that the state legislation was not in conflict with the Federal act, but rather in aid of it. The same contention is made here, inasmuch as the Indiana law requires hand holds on sides *or* ends of cars, while the Federal statute requires hand holds to be placed both on the sides and ends of cars.
>
> "The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control. The safety appliance act having superseded the Indiana statute, the judgment imposing the penalty must be reversed, and the case remanded for further proceedings not inconsistent with this opinion."

The court also said:

> "But so far as it did legislate, the exclusive effect of the safety appliance act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The states thereafter could not legislate so as to require greater or less

or different equipment; nor could they punish by imposing greater or less or different penalties. For, as said in *Prigg v. Com.*, 16 Pet. 618, 10 L. Ed. 1090: 'If Congress have a constitutional power to regulate a particular subject and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislations to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it * * * the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed.'"

Congress has occupied the field of regulation of vessels and their navigation of federal waters. Its failure, and, in some instances declination, to make further regulations indicates its decision that there should be no further regulation.

IV.

Regardless of This Court's Conclusion on the Federal Question, the Judgment of the State Court Is Right and Should Be Affirmed.

A.

Executive construction that the act applies only to waters having no navigable outlet to the sea should be followed.

But even had the state court been wrong on the federal question, there are other reasons why the writ of prohibition granted by that court must remain in effect.

The state court based its opinion (R. 140) on the ground that the federal constitution forbade the petitioners from enforcing chapter 200 as to respondents' vessels. In the course of its opinion, however, the court did note one of the reasons why petitioners must fail, regardless of the federal question, by saying:

> "We are satisfied that the act is invalid if applied to the navigable waters over which the Federal Government has control. We are confirmed in this view by the fact that in the twenty-nine years since its enactment no real attempt has been made to enforce it against those operating vessels of any kind upon the the navigable waters of the United States until the present controversy arose." (R. 146)

The state court did not note why no real attempt had been made to enforce the act. The records of the state do, however, disclose the reason. That reason was because the attorney general of the state, recognizing the exclusive right of Congress to the legislature. No test was ever made of the act to

regulate the navigation of federal waters, advised the commissioner of labor (the state official charged with the enforcement of the act), even before the act would go into effect, that it should be construed to apply only to the waters of the state having no navigable outlet to the sea. Report of the Attorney General of Washington 1907-'08, page 136. Attorney General, Opinions 1907-'08, page 136.

Chapter 200 of the Laws of 1907 became effective ninety days after the adjournment of the session at which it was enacted; that is to say, on June 11, 1907. (See statement of Secretary of State on unnumbered page XIV of the Session Laws for that year.) The attorney general's opinion to the commissioner of labor was given on June 1, 1907.

Unless the act be given a construction that it applied only to the waters within the state having no navigable outlet to the sea, reasoned the attorney general, it would be in conflict with the commerce clause of the federal constitution, and the act should therefore be so construed as to avoid that conflict.

It is apparent from the facts stated by the attorney general, and which were evidently submitted to him by the commissioner of labor, that the attorney general was considering situations just such as those which have arisen in this case. His opinion is such a succinct analysis of the bases of the federal government's exclusive jurisdiction that we set the opinion out in full in an appendix hereto (Appendix A, post following page 43).

This report of the attorney general was made to the legislature. No test was ever made of the act to

determine whether his construction was correct. The legislature has since met in thirteen regular sessions and several special sessions and no amendment has ever been made to the act to express any intent on the part of the legislature that it wanted the labor commissioner to exercise the duties imposed upon him by the act with respect to vessels navigating federal waters. Twenty-nine years elapsed after the passage of chapter 200 and this interpretation without any attempt to apply it to vessels on federal waters. Respondents have acquired property interests relying on that interpretation and the acquiescence therein by the legislature. Under these circumstances the act should now be construed as though it specifically exempted from all its provisions vessels navigating federal waters.

It has been held repeatedly by the Supreme Court of the State of Washington that the opinions of the attorney general of the state are always valuable in the interpretation of questioned statutes and, although not binding, are always considered and frequently resorted to, *Huntworth v. Tanner*, 87 Wash. 670 at page 671; and that constructions of an act of the legislature by the legal or executive department of the state, silently acquiesced in by the failure of the legislature to amend the particular act, particularly where property interests have been acquired in reliance upon the departmental construction, are entitled to weight in the construction of the statute.

Spokane & Eastern Trust Co. v. Young, 19 Wash. 122;

State ex rel. Cowles v. Shively, 63 Wash. 103;

State ex rel. Leach v. Fishback, 79 Wash. 290;

State ex rel. Ball v. Rathbun, 144 Wash. 56.

In the *Spokane & Eastern Trust Co.* case the Supreme Court of the state said:

> "It is further shown, however, that soon after the act was passed, the attorney general was called upon by the state treasurer to construe it in this particular, and he rendered an opinion holding that the rate as to state warrants was fixed by the act at eight per cent. While, of course, this construction by the executive branch of the government is not controlling, it is entitled to considerable weight in determining the intention of the legislature in the premises, in view of the fact that it was generally understood thereafter that such warrants bore eight per cent., the same as formerly, and there has been a session of the legislature since then and no change made."

In the *Cowles* case (1911) the court, referring to an opinion of the attorney general said:

> "This opinion, with others of the attorney general, was published in the usual manner, in his report to the governor and the legislature for the year 1905 at page 50. Three legislative sessions have been held since then and no change made in this law. This court has recognized the rule that the construction of a law of

> doubtful meaning by the department of a state or government charged with its administration, and by its highest law officer, when such law has to do with a matter of public concern, is entitled to considerable weight in determining the intention of the legislature, though, of course, such construction is not binding upon the courts."

The attorney general's opinion on chapter 200 of the laws of 1907 was likewise published in his report to the legislature. Thirteen regular sessions of the legislature and several special sessions have been held since.

In the *Leach* case, while the court did not rely upon the interpretation of the statute by the insurance commissioner because the court found that that interpretation was incorrect, the court answered the contention of counsel that the executive construction should be followed by saying:

> "This is no doubt true where a departmental construction has been placed upon an act and property interests have been acquired by long usage."

In the *Ball* case, the court, speaking of executive construction of an act, said:

> "This has been the uniform executive construction since the act of 1913, covering a period of some fourteen years. An executive construction is accepted generally by the courts as persuasive where the legislature has silently acquiesced in such construction by failing to amend the particular act."

The value and force of executive construction has been recognized by this court.

Boyd v. U. S., 116 U. S. 616;
Union Insurance Co. v. Hoge, 21 How. 35;
Citizens Bank v. Parker, 192 U. S. 73.

Here the legal advisor to the executive officer charged with the enforcement of the act advised him that the act did not apply to vessels navigating federal waters. The opinion was rendered before the act became effective. Since that time the legislature of the state of Washington has met not less than biennially. At none of these sessions has the law been amended nor, so far as we can ascertain, has any bill to amend it ever been presented to the legislature.

Respondents in this case have, during this period of twenty-nine years, acquired large property interests in their vessels relying upon this interpretation by the attorney general and the acquiescence of the legislature therein.

Not only has the attorney general's interpretation of the act been acquiesced in by the legislature, but there has been no attempt to enforce it as to vessels navigating federal waters.

The witness Durham did testify that for a short time a number of tug boats on Puget Sound were inspected (R. 128) but this was disproved by the testimony of witness Davis (R. 63) and witness Sutter, the state inspector during the same period covered by Durham's testimony (R. 131).

After this long period of recognition by the legislature and the executive department that the act did

not apply to federal waters, the act should now be construed as if it clearly so provided.

B.

The act was adopted from the New York Navigation Law, which applies only to such waters.

It must be confessed that it is difficult to determine whether the legislature intended that the act should apply to federal waters. It must be presumed that the legislature of the State of Washington was cognizant of such a fundamental principle as that the state was without power to regulate the lights which vessels should display on federal waters, as the matter of lights was at that time fully regulated pursuant to act of Congress. Section 9 of chapter 200 providing what lights shall be displayed makes no exceptions. That section, if applied to federal waters, is so clearly in conflict with the commerce clause that even petitioners do not contend that it may be enforced on federal waters. The same is true as to section 16—Name and Home Port of Vessel—on the stern of the vessel, and is likewise true of other provisions of the act. Section 8 provides rules for navigation "on the waters within the jurisdiction of the state, excepting the waters which are under the jurisdiction of the United States." Section 25 contains a provision applying only to the Straits of Juan de Fuca, which are federal waters.

The act is, as stated by the attorney general of the state, taken substantially from the New York Navigation Law, Laws of 1897, chapter 592; Amended

Laws 1903, chapter 420; chapter 36 New York Consolidated Laws 1916; chapter 37 New York Consolidated Laws 1909.

The Washington attorney general apparently was considering chapter 592 of the Laws of 1897, as he referred to the fact that the New York law applied only to steam vessels, whereas, by the amendment of section 1 in 1903, Laws of 1903, chapter 420, the New York law applied to all vessels. The title of the Washington act regulates vessels "navigating the waters within the jurisdiction of this state, excepting vessels which are subject to inspection under the laws of the United States." Section 1 of the New York act applied to all steam vessels "navigating the waters within the jurisdiction of this state, excepting vessels which are subject to inspection under the laws of the United States." Whether the legislature of Washington referred to territorial boundaries when it referred to vessels "navigating the waters within the jurisdiction of this state" or whether it referred to all waters over which the state had control with respect to navigation is hard to say. The fact that section 8 referred to "the waters within the jurisdiction of the state, excepting the waters which are under the jurisdiction of the United States," might be construed to indicate that it meant all waters within the territorial boundaries, but as the legislature made no exception with respect to lights (section 9), life preservers (section 12), placing of name of the boat on her stern (section 16), and others, it may be that the legislature intended by the use of the term "within

the jurisdiction of this state" to refer only to waters in which the state had jurisdiction to inspect and regulate. The provision in section 25 referring to the Straits of Juan de Fuca was not in the bill as originally introduced, but was added by House amendment (Washington Senate Journal 1907, page 812), so that the legislature may have, in the closing days of the session, when the bill was passed, determined to leave the amendment in even though it might go beyond the scope of the title rather than delay passage of the bill by disagreement between the two branches of the legislature. In any event, the attorney general, who must have been familiar with the situation, his opinion being almost contemporaneous with the passage of the act, determined that it applied only to purely state waters. New York has apparently always considered that its law should be so applied, for it will be noted that the consolidators in the Consolidated Laws of 1909, preceding chapter 37, said with respect to the New York law:

> "The navigation law brought together the general statutory provisions relating to the navigation of the waters under state control, except the canals."

This note is also found in the Consolidated Laws of 1916, chapter 36. The Consolidator in Consolidated Laws of 1909 noted the increase in the use of motor boats, saying:

> "Within the last few years the use of the waters of the state has been much increased by the use of motor boats which, bearing the same relation to waterways that the automobile

does to highways, require clear and uniform regulations. A competent and complete revision of the Navigation Law appears advisable."

This regulation was to a large extent accomplished by the enactment by that state of chapter 765 of the Laws of 1913 relating to motor boats.

C.

The provisions for examination and licensing of officers constitute an unconstitutional delegation of legislative power.

Regardless of this conclusion on that matter, however, there are other reasons why the writ of prohibition granted by the state court must stand. Section 2 of chapter 200 exempts from inspection all vessels subject to inspection under the laws of the United States. The legislature does not refer to any particular laws or to any particular character of inspection.

As we have shown above, all respondents' vessels are subject to some inspection under some federal law, and petitioners therefore clearly have no power to inspect the hulls and machinery of those vessels, and the prohibition must stand as to such inspection.

As the attempt of petitioners to enforce inspection of respondents' vessels must fail, regardless of the federal question involved, because those vessels are inspected under laws of the United States, the attempt of the petitioners to require the licensing of officers on those vessels must likewise fail, regardless of the federal question, because the power attempted

to be conferred on the commissioner of labor constitutes an unlawful delegation of legislative power. Section 14 of the act provides in part:

> "Every person employed as master, pilot or engineer on board of a steam vessel or vessel propelled by machinery, carrying passengers for hire or towing for hire, shall be examined by the commissioner as to his qualifications, and if satisfied therewith he shall grant him a license for a term of one year for such boat, boats or class of boats as said commissioner may specify in such license."

The act sets no standards whatsoever by which the commissioner shall determine the qualifications of the person to be examined. It is well settled by the law of the state that power, such as attempted to be granted by this section, may not be so granted:

State ex rel. Makris v. Superior Court, 113 Wash. 296;

State v. Northwestern Electric Co., 183 Wash. 184;

and by this Court:

Panama Refining Co. v. Ryan, 293 U. S. 388;

Schechter v. United States, 295 U. S. 495.

D.

Unless the act be construed to apply only to waters having no navigable outlet to the sea, it contains so much that is unconstitutional that the entire act must fail.

Provisions in the act apparently intended to apply alike to state waters and federal waters, which clearly could not be applied to federal waters, are so intermingled with provisions specifically exempting federal waters that unless the entire act be interpreted to apply to state waters only, as the attorney general of the state interpreted it, and as the law from which it was copied has been construed in New York, the entire act must fail. There is no saving clause in the act. The legislature expressed no desire that the act should stand in part if part should be declared to be unconstitutional. The same legislature, however, did express such a desire in another act passed at the same session. We refer to chapter 142, Laws of 1907, which provides for the furnishing by carriers of cars to shippers and prescribing the time of loading, transporting and unloading the same. The legislature appended to that act a section (section 26) reading as follows:

> "If any section, subdivision, sentence, clause or purpose of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the act."

It is the settled law of the state that the entire act must fail where so much of an act must fail because unconstitutional that it will not be presumed the legislature intended only part to stand.

State v. Powles & Co., 90 Wash. 112;
Northern Cedar Co. v. French, 131 Wash. 394.
Corwin Investment Co. v. White, 166 Wash. 195.

By giving the act the interpretation which the attorney general gave it, that is, confining it to land-locked waters, there is no doubt as to the constitutionality of any of its provisions, no conflict with federal law, and it can operate in the field in which the legislature evidently intended it to operate.

We therefore submit that the state court correctly determined that the regulations which petitioners sought to impose are a burden on interstate commerce, that they are of a character which Congress alone has power to impose, but that such power as the state might have if Congress had never occupied the field has been superseded by the exercise of that power by Congress.

We further submit that in any event the judgment of the state court is right for the reasons given above, and that the judgment should be affirmed.

Respectfully submitted,

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APPENDIX A

REPORT OF THE ATTORNEY GENERAL OF WASHINGTON—1907-1908, p. 136

Opinion No. 131

Opinion rendered June 1, 1907, by A. J. Falknor, to Hon. C. F. Hubard, commissioner of labor, Olympia, Washington.

Your inquiries involve a determination of the extent and application of the Laws of 1907, chapter 200, providing for state inspection of vessels.

Section 2 of the act provides:

> "The commissioner of labor shall annually, or oftener if he has good cause to believe it reasonable, inspect, or cause to be inspected, every steam vessel or other vessel operated by machinery engaged in carrying passengers for hire or towing for hire excepting vessels which are subject to inspection under the laws of the United States."

By the terms of the act aforesaid, vessels which are subject to inspection by the United States are exempt. This necessitates an investigation into the jurisdiction of the United States to determine what boats are subject to federal inspection.

The jurisdiction of the United States extends, in the regulation of navigation, over all "navigable waters that flow from one state into another, and out of a state into the sea, coastwise, and upon the sea to and from foreign countries."

This right arises out of the power granted to congress in article I, section 8, of the federal con-

stitution authorizing the regulation by congress of commerce with foreign nations, and among the several states, and with the Indian tribes, together with the judicial power extending over admiralty and maritime jurisdiction granted by section 2, article II of such constitution. There are decisions, however, both state and federal, which, while granting that for the specific purposes therein mentioned, the power of congress is paramount and exclusive, deny the jurisdiction of congress over vessels operating entirely within the limits of a state that do not engage in interstate commerce, although navigating waters within the jurisdiction of the United States. Indeed it must be recognized that the absolute right of the federal government to regulate and control all vessels operating on navigable waters within its jurisdiction, regardless of their business, is yet an unsettled question.

7 Cyc. 459.

The present federal navigation laws, however, are drawn on the theory that they are applicable to all vessels operating on all the waters within the jurisdiction of the United States, regardless of the character of the business in which they are engaged.

Section 440, Revised Statutes:

> "The existing legislation of congress with regard to steam vessels proceeds upon the asumption that it possesses full power to regulate all vessels navigating public waters of the United States whether they are engaged in commerce or not. * * * And it also is apparent that congress proceeds upon the theory that proper reg-

ulation requires that all vessels in those waters shall be subject to one uniform system."

Oyster Police Steamers, 31 Fed. Rep. 763; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *Harman v. Chicago*, 147 U. S. 396.

"The question is whether or not congress has, under the constitution, power to regulate by law the navigation of boats and vessels floating in the navigable waters of the United States, when engaged exclusively in the domestic commerce of the states. The respondent's counsel answer this question in the negative, on the ground that the power of congress is restricted to the regulation of commerce among the several states. If the power of congress is not full and plenary over navigation in all the waters of the United States and over all vessels carrying on commerce upon the same, whether foreign, coastwise, interstate, or strictly domestic to the states, a disastrous conflict must occur, both legislative and judicial. If the respondent's counsel be right in their position, congress has power to regulate one class of vessels and the states another class navigating the same waters side by side. In order to determine the law and the jurisdiction it would be necessary in every case to first ascertain in what kind of commerce the vessel is engaged. Congress would have the undoubted right to prescribe rules and regulations for the navigation of vessels carrying on commerce among the states and afloat upon the waters of the United States. The states, upon the re-

spondent's theory, would have power to regulate the navigation in the same waters of water-craft engaged in their strictly domestic commerce. The federal government might prescribe one set of rules and regulations; the state government, a different set of rules and regulations. By one authority certain signals for the safety of navigation might be prescribed; by the other, different signals for the same emergency. One legislative power might, in a given situation, give the ascending boat the channel; the other, the descending boat. One government might lay down a rule for steam and sail vessels passing each other, in conflict with the rule prescribed by the other. In short, the conflict of rules for the safe navigation of water-craft carrying passengers and property in the narrow water-ways of our numberless rivers and artificial channels of commerce would be infinite, unless the power of the states be excluded and that of the federal government be made full and plenary over the navigable waters of the United States. It is needless to dwell upon the mischiefs likely to result from a conflict of rules and regulations. They would be simply intolerable."

U. S. v. Burlington etc. Co., 21 Fed. 331;
City of Salem, 37 Federal Rep. 846.

However this is more theoretical than practical. Navigation, on practically all navigable waters within the jurisdiction of the United States, may be said to be under federal control as it would be hard to find a vessel which did not, at some time, take goods and

passengers which come within the definition of interstate commerce.

Steamer "Daniel Ball," 10 Wall. (U. S.) 557.

The custom officers, and other authorities required to enforce the federal navigation laws, proceed, also, upon the theory that such law applies to all vessels mentioned therein that operate on the navigable waters within the jurisdiction of the United States, regardless of their business.

A construction of the state law should be found, if possible, that would avoid a conflict of authority. There can not be concurrent inspection. It is therefore advised that the act of congress regulating navigation, is paramount and exclusive upon the navigable waters in this state within the jurisdiction of the United States.

Congress has no jurisdiction, however, over inland lakes.

> "A lake or river which is completely within the limits of a state, without any navigable outlet to any other state or country, is a navigable water of the state not within the jurisdiction of the federal government."
>
> *U. S. v. Burlington etc. Co.*, 21 Fed. Rep. 331.

In this state, therefore, congress has exclusive jurisdiction over Puget Sound and all its arms, and all other navigable waters flowing into the Pacific ocean, but does not have jurisdiction over any of the inland lakes or rivers of the state which have no navigable outlet to the sea.

Under the various acts of congress the following vessels are subject to inspection by the federal government (U. S. Revised Statutes, sections 4399-4462): All steam vessels (a vessel is deemed a steam vessel whether propelled in whole or in part by steam); vessels of other countries; boats for navigating canals; all coastwise-going vessels; sail vessels of over 700 tons carrying passengers for hire; all other vessels and barges of over 100 tons carrying passengers for hire; every ferry boat, yacht or other small craft of like character propelled by steam; all vessels of above 15 gross tons carrying freight or passengers for hire not engaging in fishing as a regular business, propelled by gas, fluid, naphtha, or electric motors; tug boats, towing boats, and freight boats; and all foreign, private steam vessels carrying passengers from any port in the United States to any other place or country.

All the above-named vessels, being subject to inspection under the federal statutes, are consequently, even by the terms of the state statute, exempt from inspection by the state, except upon inland rivers and lakes.

Section 4426, as amended by the act of May 16, 1906, contains the following provision:

> "All vessels of fifteen gross tons or less propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid or electricity, and carrying passengers for hire, *shall carry one life-preserver*, of the sort prescribed by the regulations of the board of supervising inspectors, *for every passenger carried and no such boat*

while so carrying passengers shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as a condition of the obtaining of such license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the hodler, and if revoked, the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation."

Such vessels being vessels propelled by machinery are likewise required to comply with the provisions of the act of congress of June 7, 1897, relating to regulations for preventing collisions upon certain harbors, rivers and inland waters of the United States. That act relates to lights, signals, steering, etc. Such vessels also, at all times when under way, are subject to examination and inspection by examining officers and others charged with the enforcement of the navigation laws, to see that the above requirements are observed. No certificate of inspection of such boats appears to be issued, and no other inspection except as heretofore set out, seems to be required. The only written license issued is to the person, authorizing him to operate and navigate vessels of fifteen gross tons or less, propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, electricity, etc., and carrying passengers for hire. No examination as to fitness is required of an applicant for such

a license, but it may be revoked for the reasons copied in the above statute.

Are such boats, when carrying passengers for hire, subject to inspection by the state law when operating on waters within the jurisdiction of the United States?

> "With reference to purely local matters pertaining to shipping and navigation, a state may legislate *if congress has taken no action upon the subject.*"
>
> 25 A. & E. Encyc. of Law, 863.

(Here the attorney general quoted from *Prigg v. Pennsylvania* the same passage quoted in the foregoing brief. It is omitted to avoid repetition.)

> "In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which congress has control. No state can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of congress. The requirement that every steam tug, barge or tow-boat, towing vessels or craft for hire in the

Chicago river or its branches shall have a license from the city of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of congress to regulate commerce, interstate and foreign. The steamtugs are not confined to any one particular locality, but may carry on the trade for which they are licensed in any of the ports and navigable rivers of the United States. They may pass from the river and harbor of Chicago to any port on Lake Michigan, or other lakes and rivers connected therewith. As justly observed by counsel: The citizen of any of the states bordering on the lakes who with his tugboat, also enrolled and licensed for the coasting trade, may wish to tow his or his neighbor's vessels, must, according to the ordinance, before he can tow it into the Chicago river, or any of its branches, obtain a license from the city of Chicago to do so. The license of the United States would be insufficient to give him free access to those waters."

Harman v. Chicago, 147 U. S. 406-7.

"In discussing the question, whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that

inquiry, because it has been exercised, and the regulations which congress deemed it proper to make, are now in full operation."

Gibbons v. Ogden, 9 Wheat. (U. S.) 200.

But here congress has acted upon a subject upon which it has plenary power. Such boats, though having no written license to operate, have implied license to navigate the waters within the jurisdiction of the United States, upon complying with the conditions set out. If such boats should fail to observe the law of June 7, 1897, relating to lights, signals, steering, etc., they are liable to fine and damages sustained. Should the licensed engineer in charge be guilty of misconduct, gross negligence, recklessness in navigation, intemperance, or violation of laws, his license shall be revoked and he be precluded from obtaining another within one year from the date of revocation. Indeed it must be observed that the inspectors may, under the above law, inspect the boat to determine whether there was misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law, and in making such inspection an examination of the boat, its machinery and the condition of the same would have to be made.

The character of the inspection required by the federal government to relieve from state inspection is not stated and the requirements imposed upon such craft constitute, if properly enforced—and it will be presumed the federal officers will do their duty—a very substantial inspection.

The regulation of such boats upon the waters of the United States being within the exclusive jurisdic-

tion of congress, congress has acted upon the matter and has indicated such an inspection as it deemed adequate. Under the decisions quoted in the cases of *Briggs v. Pennsylvania, supra; Harman v. Chicago, supra, and Gibbon v. Ogden, supra,* when congress has acted upon a matter within its jurisdiction, its action must be taken as final and exclusive, and the state will not be permitted to add to, or supplement such legislation.

It may be conceded that a state, in the exercise of its police power, may pass and enforce laws for the protection of the health, lives, and property of its people, against the dangers arising under interstate transportation and commerce, and that such laws may be enforced so long as they do not conflict with the provisions of federal legislation.

Nashville R. v. Alabama, 128 U. S. 96.

But here congress has acted upon a subject upon which it has plenary power, even were this conceded to be a matter pertaining to the police power of the state.

> "The line which separates the powers of congress is not always distinctly marked and oftentimes it is not easy to determine on which side a particular case belongs. * * * State legislation which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom does encroach upon the exclusive power of congress."

Hall v. DeCuir, 95 U. S. 488.

This applies to the transportation of passengers as well as freight.

"If as our whole course of legislation on this subject shows, the power of congress has been universally understood in America, to comprehend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct; and, if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to congress, and no exception to the grant can be admitted, which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine, as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. * *

"The argument urged at the bar, rests on the foundation, that the power of congress does not extend to navigation, as a branch of commerce, and can only be applied to that subject incidentally and occasionaly. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution, or by reason, for discriminating between the power of congress over vessels employed in navigating the same seas. We can perceive no such distinction."

Gibbons v. Ogden, 9 Wheat. (U. S.) 215-6.

An examination of the state law in question shows that it goes far beyond the police power that may, in

the absence of congressional legislation, be exercised by the state. Many of these crafts under fifteen gross tons, operated by gas, etc., navigate the Columbia river and waters contiguous to this state and British Columbia, and are engaged in the carrying of passengers and freight between this state and Oregon and British Columbia. Under the present federal navigation law such boats may operate, if in charge of one licensed engineer. By the state law more than one licensed officer may be required. By the federal law one life preserver of the sort prescribed by the regulations of the board of supervising inspectors for every passenger carried is required. By the state law not only may a greater number of life-preservers be required but one-half of those required are of a defined kind and the other half such as the state inspector may designate. By the state law the number of passengers in such boat may be limited. In addition, these boats now permitted to operate on federal waters will be required to pay an annual inspection fee of not less than five nor more than twenty dollars in addition to an annual license fee of five dollars.

"In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. Thus, in *The Passenger Cases*, 7 How. 445, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In the *Wheeling Bridge Case*,

13 id. 518, the statute of Virginia authorized the erection of a bridge, which was held to obstruct the free navigation of the river Ohio. In the case of *Sinnot v. Davenport*, 22 id. 227, the Statute of Alabama required the owner of a steamer navigating the waters of the state to file, before the boat left the port of Mobile, in the office of the probate judge of Mobile county, a statement in writing, setting forth the name of the vessel, and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the state in addition to those prescribed by congress. And in all the other cases where legislation of a state has been held to be null for interfering with the commercial power of congress, as in *Brown v. Maryland*, 12 Wheat. 425; *State Tonnage Tax Cases*, 12 Wall. 204, and *Welton v. Missouri*, 91 U. S. 275, the legislation created, in the way of tax, license, or condition, a direct burden upon commerce, or in some way directly interferred with its freedom."

Sherlock et al. v. Alling, 93 U. S. 102-3.

The state law attempts clearly to impose a burden and restraint upon interstate and foreign commerce and to regulate navigation—subjects exclusively within the power of congress whenever it has acted. The state law in question is taken substantially from the state inspection law of New York, but an examination of the New York law shows that it does not at-

tempt to inspect in that state other than steam vessels upon its own waters, not inspected by federal authorities. By its own limitations the New York law confines inspection in that state to steam vessels upon its inland waters.

By taking this construction of the law, conceding the acts of congress to be exclusive over the waters of the United States, and the act of the state of Washington exclusively upon the inland lakes and rivers, no conflict of authority can occur and the owners of vessels will be relieved of the embarrassing position of dealing with conflicting authorities.

You are therefore advised to limit the application of the state inspection law to such vessels as it covers, which operate upon the inland lakes and rivers of the state of Washington not having any navigable outlet to the sea.